

Commentary of
Governor's Subsistence Drafting Committee

December 15, 2001

CONSTITUTIONAL AMENDMENT

The drafting committee proposes this constitutional amendment in furtherance of the Governor's Subsistence Leadership Summit's call for an amendment "guaranteeing a rural subsistence priority for uses of Alaska's fish and game resources."

Subsection 19(a) sets the context for the following subsections. It is not intended to confer any rights. Instead, it is an expression of both the high value that the state holds for Alaska's first peoples and their subsistence way of life and the central role the subsistence way of life has and continues to play in Alaska. In the words of the Subsistence Leadership Summit of August 2001:

Customary and traditional uses of Alaska's fish and wildlife originated with Alaska Natives and continue to be integral to the lives and essential to the survival of Alaska Native peoples and communities, and have been adopted and supplemented by many non-Native Alaskans as well. These uses, among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users.

Subsection 19(b) establishes the basic subsistence priority. Before there can be any harvest of fish, game, or other renewable resource, sustainability of the resource for maintaining healthy populations and use by future generations must be satisfied. Once the requirements for sustained yield have been met, but there is insufficient harvestable surplus to meet all consumptive uses, the subsistence priority applies. Virtually all

harvestable species are subject to some restrictions. Thus, in practical effect, the subsistence priority is nearly always in place.

The subsistence priority itself is extended to rural residents for fish stocks, game populations, or other renewable resources customarily and traditionally taken for subsistence uses in the area in which the rural resident resides. In operation, this means that local rural residents have priority for the taking of such resources for subsistence uses over other rural residents living in areas that do not have customary and traditional use of those same resources. Also, rural residents in one part of the state will not have a priority for subsistence use in another area that is outside their subsistence use area (e.g., Barrow residents cannot claim a priority in the Angoon area since the community of Barrow does not have customary and traditional use of the area or resources near or reasonably accessible to Angoon).

There may be circumstances in which there is not enough harvestable surplus to meet all of the customary and traditional subsistence uses in an area. In that event, the number of subsistence users eligible to hunt or fish must be reduced by eliminating some potential users. Subsection 19(b) requires a reduction based on three criteria: (1) customary and direct dependence on the resource; (2) proximity to the resource; and (3) ability to obtain alternative resources.

Subsection 19(c) authorizes – but does not require – the creation of one or more categories of subsistence users with a subsidiary preference who will, in turn, have preference over other consumptive users (e.g., personal use, sport, and commercial

users). The subsidiary preference can be provided only when the activities of these secondary subsistence users would not diminish the ability to provide the primary subsistence priority in subsection 19(b). In proposing this subsection the drafting committee identified three groups that commended themselves to legislative review at the statutory level:

- (1) residents from outside a Section 19(b) area who have demonstrated customary and traditional use of a fish stock, game population, or other renewable resource;
- (2) residents currently living in urban Alaska who for an extended period of time lived in a rural area and participated in the subsistence harvest and wish to return to the rural area to continue doing so; and
- (3) discrete communities for which the subsistence way of life is central but which have been surrounded by or incorporated into urban areas (e.g., the Native Village of Eklutna in the Municipality of Anchorage and the Kenaitze Indian Tribe in the Kenai Peninsula Borough).

FRAMEWORK FOR REGULATORY CHANGES

The drafting committee proposes changes to meet the goals identified by the Governor's Subsistence Leadership Summit of August 15-16, 2001, and to

- implement the provisions of the proposed constitutional amendment to provide a rural subsistence priority, as discussed above;

- bring state law into conformance with the terms of ANILCA and, thus, regain unified state management of fish and game resources in Alaska; and
- provide an opportunity for participation by Alaska Natives and other rural residents in the management of Alaska's fish and game resources for subsistence uses, while reserving the state's final decision-making authority for management of those resources.

The changes agreed to by the committee address these goals and fall into three categories:

- (1) common federal and state definitions,
- (2) statutory concepts for consistency with ANILCA, and
- (3) other state statutory or regulatory changes for improvement of subsistence management.

Definitions of Subsistence Uses

The committee recommends defining both "customary and traditional" and "subsistence use" in essentially the same way as they are now used in state law. However, to accommodate the use of the term "subsistence" in paragraph 19(c) of the proposed constitutional amendment, which creates the ability to grant a subsidiary priority for subsistence, the committee recommends that the phrase "by a resident domiciled in a rural area" be removed from the statutory definition of subsistence uses.

The committee also recommends that the definition of subsistence uses be clarified to include customary and traditional patterns, practices, methods, and means of

taking and use but not so as to preclude more efficient methods and means that have evolved or been adopted over time.

The committee recommends that the statutes clarify that priority for participation in a particular subsistence hunt or fishery is granted to residents of the rural area with a customary and traditional use of the resource. This will, in effect, result in a "local" priority.

Approaches to Defining "Areas" and "Rural"

Because the subsistence priority is provided to residents who have a customary and traditional use of a particular fish stock or game population, the definition of "areas" is an important concept in the new statutory provisions. The drafting committee agreed that the Boards of Fisheries and Game should have flexibility to define subsistence areas that adhere to customary and traditional use patterns.

Determination of areas that are "rural" and "non-rural" would also be a prerogative of the Joint Boards, as it is now. The drafting committee recommends use of a population factor as the initial screen in determining whether an area is "rural" or "non-rural" (following the current practice of the Federal Subsistence Board), but recommends that criteria based on community characteristics be permitted to override presumptions based on population. While recommending population as a first screen, the committee neither endorsed nor rejected the levels used in current federal regulations, noting that the

Federal Subsistence Board is now sponsoring research designed to refine application of its population-based system.

Definition of “Customary Trade”

In drafting this definition the committee intends to provide for existing, ongoing traditional practices involving the exchange of limited quantities of fish or game for money. Such trade traditionally takes place outside the normal stream of commerce. The committee recognized that, absent regulation and oversight of such trade, it could easily be subject to abuse and could undermine general public support of the subsistence tradition.

Local and Regional Participation

The Subsistence Leadership Summit's recommendations to the governor stressed the importance of developing a subsistence management system that provides “a form of co-management of Alaska's fish and game resources that includes the opportunity for significant participation by Alaska Natives and rural residents”

The drafting committee supports this idea, agrees that aspects of co-management can create new tools to manage the state's fish and game resources, and endorses adoption of the essential structure of the popular federal subsistence regional advisory council structure. This structure can serve as a model for providing for local and regional

participation in management of subsistence resources. The committee recommends additional elements to improve on that system.

The regional council system should be structured to ensure participation and representation by commercial, personal use, sport, and other users as well as by Alaska Natives and other subsistence users. There must be enough regions and regional councils so that regional subsistence patterns are adequately accommodated, subsistence users are meaningfully involved, and subsistence resources and uses are effectively managed. Members of the councils should be rural residents and Alaska Natives of the region and would be appointed by the governor.

A critical element of a successful regional council system will be adequate support and funding from both state and federal sources. Section 805 of ANILCA Title VIII calls for the Secretary of Interior to reimburse the state for the operation of a regional council system when the state is exercising management of the resources (Sec. 805 (e)).

Standard for Implementation of Subsistence Preference

The subsistence preference would be implemented using the “meaningful opportunity” standard. This standard makes it clear that while a preference for subsistence offers an opportunity consistent with customary and traditional patterns to participate in a subsistence hunt or fish with a meaningful expectation of success, such a preference does not guarantee the taking of fish or game.

Though it was not expressly addressed by specific recommendations, the committee stresses the importance of “common sense” or a “rule of reason” in applying the subsistence preference. For example, the committee described the need to consider that a commercial fishery might reasonably harvest, as by-catch, an insignificant portion of a stock that is managed for subsistence purposes. In general, the committee believes it should be possible to restrict subsistence uses while allowing other uses to continue, so long as a meaningful opportunity for subsistence use is provided.

Coordination, Consultation, Contracting, Use of Traditional Knowledge, Creation of Specific Co-management Bodies

The proposed changes would give the Commissioner of Fish and Game specific authority to work with and make use of the special knowledge of local residents engaged in subsistence uses and to enter into cooperative agreements with tribes, Native corporations, and other organizations for the management of subsistence uses and resources, for research, and for other resource issues of mutual concern..

Taking Fish and Game by Proxy

The recommended provision would broaden the category of individuals for whom proxies could hunt and fish to include rural residents unable to fill their subsistence allocation. Current statutes allow disabled and elderly individuals to appoint proxies.

Cultural and Educational Permits

Under current regulations, cultural and educational permits may be issued to teach and preserve historic or traditional uses and harvest practices. This type of special permitting program would be placed in statute. These permits would not receive a subsistence priority. A subsidiary subsistence priority for such hunts and fisheries could be allowed under Section 19(c) of the proposed constitutional amendment, which allows the legislature to grant such secondary subsistence priorities.

Achieving Consistency in Definitions

The committee believes that, in keeping with its desire to fully resolve the subsistence issue, the definition of certain terms in state and federal law should be consistent. With some exceptions, those definitions are set out in the regulatory recommendations that accompany this report. There is a difference of opinion within the committee as to how to achieve this consistency. Some believe that ANILCA should be amended. Others disagree. Despite these differences, the committee remains united in its agreement about the important role subsistence plays in the lives of Alaskans and the goal of a subsistence priority for rural Alaskans.